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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL LEE CURTIS, Defendant and Appellant.	F056897 (Super. Ct. No. VCF207728) **O P I N I O N**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. James W. Hollman, Judge.

David L. Annicchiarico, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lloyd G. Carter and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Dawson, Acting P.J., Kane, J., and Poochigian, J.

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A jury convicted appellant Michael Lee Curtis of carjacking (Pen. Code, § 215, subd. (a);[1] count 1), second degree robbery (§§ 211, 212.5, subd. (c); count 2) and assault with a deadly weapon (§ 245, subd. (a)(1); count 3), and found true allegations that in committing the count 1 and count 2 offenses appellant personally used a deadly weapon (§ 12022.3, subd. (b)). The court imposed a prison term of four years, consisting of the three-year lower term on the count 1 substantive offense and one year on the accompanying weapon-use enhancement. The court imposed concurrent two-year terms on each of counts 2 and 3, and stayed the count 2 enhancement.

On appeal, appellant contends the court, in ordering appellant's sentences on counts 2 and 3 to be served concurrently with the sentence imposed on count 1, violated the section 654 proscription against multiple punishment. We will affirm.

FACTS

Prosecution Case

After becoming became acquainted on an internet social networking site, Juan D. and appellant got together on approximately eight to ten occasions prior to July 25, 2008 (July 25), and engaged in sexual activity on approximately half of those occasions.[2]

At approximately 3:00 to 3:30 a.m. on July 25, Juan D., pursuant to arrangements he and appellant had made earlier, drove to a location a short distance from appellant's residence and picked appellant up. Juan D. then, following appellant's directions, drove a short distance to an orchard and parked. In the car, Juan D. performed oral sex on appellant. After approximately ten minutes, the two got out of the car and walked to the

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[1] All statutory references are to the Penal Code.

[2] The "Prosecution Case" section of our factual statement is taken from Juan D.'s testimony.

back of the car where Juan D. again performed oral sex on appellant. The two then got back in the car where they continued to engage in oral sex, after which they began kissing.

At some point, while the two were kissing, Juan D. felt pain and the sensation of his neck being cut. He also felt blood trickling down his neck. He saw a knife--the blade of which was approximately two and one-half inches long--in appellant's hand. Juan D. grabbed appellant's hand asked appellant what he was doing. Appellant told Juan D. to "shut up" and stated he (appellant) had a gun. Appellant started reaching toward the bottom of his pants, at which point Juan D. let go of appellant's hand.

Next, appellant told Juan D. to open the car's trunk. Juan D. responded he could not do so from inside the car, at which point appellant told Juan D. to get out of the car. Juan D. did so, as did appellant. When the two were out of the car, appellant demanded Juan D.'s cell phone. Juan D. handed the cell phone to appellant.[3] The two then got out of the car and walked to the back of the vehicle, where, at appellant's insistence, Juan D. opened the trunk. There were several items in the trunk, and appellant told Juan D. to take everything out. At that point, Juan D. concluded that if he got in the trunk appellant would kill him, and took off running.

Appellant gave chase and as Juan D. was running, appellant demanded the car keys. After Juan D. had run approximately 100 feet, appellant caught up with him and began hitting him. Juan D. threw the keys, and appellant stopped the attack and retrieved

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3 On cross-examination, Juan D. testified that appellant demanded the phone at the point he (Juan D.) let go of appellant's hand, while the two were still in the car, and that Juan D. handed over the phone at that point.

The prosecutor told the jury, and the parties agree, that the robbery count was based on the taking of the cell phone.

them. Juan D. then ran out into the street, flagged down a passing motorist, borrowed the motorist's cell phone and called 911.

The police found Juan D.'s car later that morning approximately one-half mile from where Juan D. had parked it.

Defense Case

Appellant testified he became acquainted with Juan D. on an internet web site on which Juan D. indicated he was a "Female seeking male."[4] Appellant and Juan D. got together on six occasions. On the second occasion, Juan D. made sexually suggestive comments; on the third occasion he fondled appellant's penis; and on the fourth occasion Juan D. performed oral sex on appellant. On these occasions, it was dark out and appellant thought Juan D. was a woman because Juan D. had shoulder length hair, spoke in a high voice, wore a bra and appeared to have breasts like those of a woman.

Approximately two weeks after their fourth meeting, Juan D. informed appellant by text message that he (Juan D.) was a man. Appellant was shocked, embarrassed and ashamed. However, shortly thereafter, he and Juan D. got together a fifth time because he (appellant) had no car available for his use, a friend of his was "in trouble" and appellant needed a ride to go to his friend's aid. Juan D. picked up appellant and offered to perform oral sex on appellant, but appellant declined and stated he just wanted a ride.

Two days later, appellant agreed to meet with Juan D. again because he (appellant) had been "deceived"; he "felt [he] deserved an explanation"; and although he "kn[e]w" he was not homosexual, "[i]t's confusing" and he "needed an answer to [his] mixed feelings." As in each of their previous meetings, Juan D. drove to a spot near appellant's residence and picked him up. Juan D. drove to a spot on a dirt road, parked and offered

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[4] The "Defense Case" portion of our factual statement is taken from appellant's testimony.

to perform oral sex on appellant. Appellant declined, although he later told a police detective that Juan D. had performed oral sex on him during this meeting.

After appellant rebuffed Juan D.'s sexual advance, Juan D. pushed appellant against the car door, at which point appellant swung at Juan D. and got out of the car. Outside the car, Juan D. pushed appellant up against the car and began to fondle him. Appellant punched Juan D. and ran off.

Appellant did not have a knife or gun with him and he did not demand Juan D.'s keys, take his cell phone or cut him with a knife.

DISCUSSION

Section 654 subdivision (a) provides, in relevant part: "An act or omission that is made punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Thus, "section 654 proscribes double punishment for multiple violations of the Penal Code based on the 'same act or omission.'" (*People v. Siko* (1988) 45 Cal.3d 820, 822.) "The 'singleness of the act,' however, is [not] the sole test of the applicability of section 654." (*People v. Beamon* (1973) 8 Cal.3d 625, 637.) In addition, "[d]ecisions of [the California Supreme Court] have engrafted onto section 654 a judicial gloss interpreting 'same act or omission' to include multiple violations committed in an 'indivisible' or 'single transaction.'" (*People v. Siko*, *supra*, 45 Cal.3d at p. 822.)

In determining whether a course of conduct consisting of multiple acts is indivisible, we look to the "defendant's intent and objective ...." (*People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*).) "[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." (*Ibid.*) On the other hand, if the defendant harbored "'multiple or simultaneous objectives,

independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]'" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

Although the applicability of section 654 to conceded facts is a question of law (*Harrison, supra*, 48 Cal.3d at p. 335), the question of whether a defendant entertained multiple criminal objectives is generally one of fact for the trial court, whose findings will be upheld on appeal if supported by any substantial evidence (*People v. Osband* (1996) 13 Cal.4th 622, 730-731; *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312). "We review the trial court's findings 'in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]' [Citation.]" (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.)

Applying these principles, we turn to appellant's arguments. We first address his contention that section 654 precludes punishment for both the carjacking (count 1) and the robbery (count 2) in which, as indicated above, appellant took the victim's cell phone. Appellant argues he committed the robbery and the carjacking "in furtherance of his single, criminal objective of taking Mr. [Juan D.'s] property by force."

Appellant likens his case to *People v. Dominguez* (1995) 38 Cal.App.4th 410 (*Dominguez*). There, the victim had just parked his van near a restaurant when the defendant suddenly entered the van, pointed a gun at the victim and said, """Give me everything you have."""" (*Id*. at p. 414.) The victim handed over two rings and a chain, and ran into the restaurant, where he called the police. The van was later found less than a mile away. (*Id*. at pp. 414-415.) The Court of Appeal held that section 654 precluded separate punishments for the defendant's convictions for robbery--based on the taking of the victim's jewelry--and carjacking. (*Id*. at pp. 416-420.) Appellant contends

Dominguez stands for the proposition that "where a victim hands over personal belongings and flees before the defendant takes his or her vehicle, section 654 prohibits multiple punishment [for both robbery and carjacking] and the sentence for robbery must be stayed." We disagree. *Dominguez* is inapposite.

As indicated above, section 654 applies to multiple convictions based on (1) the "same act" (§ 654), and (2), in a judicial gloss on the "same act" language, multiple acts committed as part of an indivisible transaction. *Dominguez* is a "same act" case. (*Dominguez*, *supra*, 38 Cal.App.4th at p. 420 ["the carjacking and robbery here constituted 'the same act' [within the meaning of section 654]."].) In a single act, the defendant in that case placed a gun to the back of victim's neck and demanded """everything""" the victim had, and the victim simultaneously handed over his jewelry and his vehicle. (*Id*. at p. 414.) Here by contrast, appellant, after committing the robbery by taking the victim's cell phone, got out of the car, walked to the back of the car, ordered appellant to open the trunk and, when the victim fled, gave chase, demanded the car keys, caught up with the victim and begin hitting him, at which point the victim relinquished the car keys, thereby allowing appellant to complete the carjacking. Thus, unlike *Dominguez*, the robbery and the carjacking did not constitute the same act. Rather, appellant's convictions of those offenses were based on multiple acts.

Appellant also argues those acts constituted an indivisible transaction for purposes of section 654 because, he asserts, "case law holds that the theft of multiple items in the same transaction is a single criminal objective ...." He bases this contention on *People v. Bauer* (1969) 1 Cal.3d 368. In that case the defendant and an accomplice entered a home, tied up its occupants, took numerous items of personal property and, after loading the property into one of the victim's cars, drove off in the car. The defendant challenged the trial court's decision to punish him for both the robbery and auto theft. Interpreting section 654, our Supreme Court explained that "the taking of several items during the

course of a robbery may not be used to furnish separate sentences.... [W]here a defendant robs his victim in one *continuous* transaction of several items of property, punishment for robbery on the basis of the taking of one of the items and other crimes on the basis of the taking of the other items is not permissible." (*Id.* at pp. 376-377, italics added.)

In our view, however, appellant did not take the cell phone and the car in the course of a continuous transaction. Rather, there was a break in the action between the taking of the cell phone and appellant's subsequent attack on Juan D. when the victim fled, giving appellant an opportunity to cease his criminal activity. This factor distinguishes *Bauer*. On this point, we find instructive *People v. Trotter* (1992) 7 Cal.App.4th 363 (*Trotter*) and *People v. Surdi* (1995) 35 Cal.App.4th 685 (*Surdi*).

In *Trotter*, the defendant carjacked a taxi and during a police chase fired three shots at the pursuing officer (the second shot a minute apart from the first and the third shot a few seconds later) constituting assaults that defendant argued were subject to section 654 as part of a single course of conduct to avoid apprehension. The Court of Appeal, which later decided *Surdi*, disagreed. As the majority in *Surdi* explained: "We started our analysis [in *Trotter*] by examining [*Harrison, supra*, 48 Cal.3d 321], in which the Supreme Court found the defendant harbored separate intents to obtain gratification with each sexual penetration he committed. *Harrison* determined criminal acts committed pursuant to independent multiple objectives may be punished separately even if they share common acts or are part of an indivisible course of conduct. Finding 'no reason to limit *Harrison*'s reasoning to sex crimes,' we ruled, '... this was not a case where only one volitional act gave rise to multiple offenses. Each shot required a separate trigger pull. All three assaults were volitional and calculated, and were separated by periods of time during which reflection was possible. None was spontaneous or uncontrollable. "[D]efendant should ... not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed

his ... assaultive behavior." [Citation.]' [Citation.] Because each shot increased the defendant's culpability and evinced a separate intent to do violence against the pursuing officer, we determined the defendant could be separately punished for each assault. [Citation.]" (*Surdi, supra,* 35 Cal.App.4th at p. 689.)

In *Surdi,* the defendant, along with other persons associated with a group known as the Family Mob (Mob), attacked and beat the victim (Sanchez) and then hauled him inside a van, where the defendant strapped a seat belt around Sanchez's neck to hold him down while another Mob member (Lomeli) stabbed the victim with a screwdriver. "Eventually," the attackers took the victim to a riverbed where the defendant helped drag the him to a "dirt area." (*Surdi, supra,* 35 Cal.App.4th at p. 687.) There, appellant and other Mob members beat the victim more before abandoning him. The victim somehow survived; the defendant was convicted of, inter alia, conspiracy to commit murder, aggravated mayhem and kidnapping; and prison terms were imposed on each offense. (*Ibid.*)

The *Surdi* court rejected the defendant's argument that execution of sentence on the kidnapping conviction should have been stayed pursuant to section 654. The court reasoned: "Like *Trotter*, the offenses presently under review did not arise from a single volitional act. Rather, they were separated by considerable periods of time during which reflection was possible. Lomeli's initial stabbing attack was interrupted in the van to permit Surdi to strap down Sanchez with a seat belt. There was also a break in the action when the group stopped at a school and discussed whether to abandon Sanchez there. After ample time to consider their actions, the group resumed the attack while taking Sanchez to the riverbed, where Mob members took turns stabbing Sanchez until they thought he was dead." (*Surdi, supra,* 35 Cal.App.4th at p. 689.)

Here, as in both *Trotter* and *Surdi*, there was a break in the action between one act of violence--the robbery, in which appellant took the cell phone--and the subsequent

violent act in which appellant chased the victim down and beat him into giving up his car. Between these two acts, appellant had time to reflect. And, significantly, the victim left (or attempted to leave) the scene. At that point, by simply doing nothing, appellant could have ended his course of criminal conduct. But instead, he committed another volitional act, embarking on a course of conduct that resulted in another act of violence, the completion of the carjacking. He "'should ... not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his ... assaultive behavior.'" (*Trotter*, *supra*, 7 Cal.App.4th at p. 368.) Therefore, appellant was properly punished for both robbery and carjacking.

Appellant also argues that section 654 requires that execution of sentence on his assault conviction must be stayed. He asserts that the knife assault was simply "a means of facilitating" the robbery and the carjacking.

Appellant relies in part on *People v. Brown* (1989) 212 Cal.App.3d 1409. In that case, defendants Whitaker and Brown broke into the apartment occupied by the three victims, Whitaker fired multiple shots at one of the victims, and the two intruders proceeded to rob the victims. The Court of Appeal held that the trial court erred in failing to stay imposition of sentence on Whitaker's conviction of assault with a firearm, stating: "[I]f there is an assault in the course of conducting a robbery, then there is only one [act under section 654].... [¶] … The assault [with a firearm] was clearly in the course of the robbery and was not a separate and distinct act. Thus, the defendants cannot be sentenced on both [the robbery and the assault]." (*Id*. at p. 1427.)

In *Brown* the record contained no hint of any reason for the assault other than facilitation of the robbery. Here, by contrast, appellant testified that as a result of Juan D.'s deception, he felt confused, ashamed and embarrassed. The court reasonably could have both credited Juan D.'s account of the events of July 25 *and* concluded that appellant stabbed Juan D. out of anger he felt at being deceived, and that appellant

formed the intent to take the victim's cell phone and car afterward. (Cf. *People v. Medina* (1978) 78 Cal.App.3d 1000, 1005-1006 [trier of fact may accept all or part of witness's testimony while rejecting the rest].) Thus, substantial evidence supports the sentencing court's implied determination that appellant's intent in stabbing Juan D. was separate from his intent in committing the robbery and carjacking.

DISPOSITION

The judgment is affirmed.